FILE COPY

Office Supreme Court, U.
FILED
JAN 30 1933
CHARLES ELMORE CROPLEY
CLERK

No. 496.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

vs.

ERNEST BROOKS, HAROLD WILSON BROOKS, and WALTER DOUGLAS BROOKS, as Executors of the Will of ERNEST AUGUSTUS BROOKS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS.

GREENE & HURD,
FRANCIS B. HAMLIN,
Attorneys for Respondents,
52 Broadway,
New York City.

FRANCIS B. HAMLIN,
JAMES L. DOHR,
of Counsel.

GALLO & ACKERMAN, Inc., 142 Liberty Street, Telephones—Rector 2-5356-7

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Involved	2
The Statute	3
Statement of Facts	4
Specifications of Error	6
Summary of Respondents' Argument	7

Argument:

I. The Revenue Act of 1924 does not treat intangibles consisting of stock of a foreign corporation and bonds, the paper evidences of which are physically present in the United States, and of a debt due from a domestic debtor, as property situated in the United States 7

II. The Revenue Act of 1924 if given the construction for which the petitioner contends would be repugnant to the Fifth Amendment to the Constitution of the United States 21

Conclusion 34

CITATIONS.

PAGES

Cases:

Baldwin vs. Missouri, 281 U. S., 586 ..... 23, 24, 27, 30, 33
Beidler vs. South Carolina Tax Commission, 282 U. S., 1 ..... 23, 24
Blackstone vs. Miller, 188 U. S., 189 ..... 9, 16, 24, 28, 29
Blodgett vs. Silberman, 277 U. S., 1 24
Brewster vs. Gage, 280 U. S., 327 ..... 18, 21
Bristol vs. Washington County, 177 U. S., 132 27
Buck vs. Beach, 206 U. S., 392 9
Cook vs. Tait, 265 U. S., 47 ..... 31, [redacted]
DeGanay vs. Lederer, 250 U. S., 376 ..... 11, 26, 28, 29
Eidman vs. Martinez, 184 U. S., 578 ..... 9, 11, 19
Estate of Garvan vs. Commissioner, 25 B. T. A., 612 17
Ewa Plantation Co. vs. Wilder, 289 Fed., 664 11
Farmers Loan & Trust Co. vs. Minnesota, 280 U. S., 204 ..... 23, 24, 29
First National Bank of Boston vs. Maine, 284 U. S., 312 ..... 23, 24, 25, 26, 29
Frick vs. Pennsylvania, 268 U. S., 473 32
Gould vs. Gould, 245 U. S., 151 19
Heiner vs. Donnan, 285 U. S., 312 ..... 22, 23, 31
Hill vs. Carter, 47 Fed. (2d), 869 ..... 11, 29
Kepner vs. United States, 195 U. S., 100 12
Kirtland vs. Hotchkiss, 100 U. S., 491 ..... 9, 10
Metropolitan Life Ins. Co. vs. New Orleans, 205 U. S., 395 27
National Lead Company vs. United States, 252 U. S., 140 18
New Orleans vs. Stempel, 175 U. S., 309 ..... 9, 10, 16, 27
Railroad Company vs. Pennsylvania (State Tax on Foreign-Held Bonds), 15 Wall., 300 ..... 9, 21

PAGES

Russian Volunteer Fleet vs. United States, 282 U. S., 481 ..... 22, 33
Safe Deposit & Trust Company vs. Virginia, 280 U. S., 83 26
Sanchez vs. Bowers, 57 Fed. (2d), 324 17
Schlesinger vs. Wisconsin, 270 U. S., 230 22
Shenton vs. United States, 53 Fed. (2nd), 249 ..... 17, 20
State Tax on Foreign-Held Bonds (Railroad Company vs. Pennsylvania), 15 Wall., 300 ..... 9, 21
United States vs. Bennett, 232 U. S., 299 31
United States vs. Goelet, 232 U. S., 293 31
Wheeler vs. Sohmer, 233 U. S., 434 ..... 9, 28

Statutes:

Revenue Act of 1918,
Sec. 403 (b) (3) 14, 15
Revenue Act of 1921,
Sec. 217 20
Sec. 403 (b) (3) 14
Revenue Act of 1924, c. 234, 43 Stat., 253,
Sec. 217 20
Sec. 301 (a) 3
Sec. 302 8
Sec. 302 (a) 3
Sec. 303 8
Sec. 303 (b) 3, 6, 8
Sec. 303 (d) 3, 8, 13, 15, 20
Sec. 303 (e) 4, 13, 15, 16, 17, 20
Sec. 391 (a) 8

Treasury Regulations:

Regulations 63, Art. 53 (Revenue Act of 1921) 19

Miscellaneous:

Report of the Committee on Finance (Report No. 275, 67th Congress, First Session) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 496.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ERNEST BROOKS, HAROLD WILSON BROOKS and WALTER DOUGLAS BROOKS, as executors of the will of Ernest Augustus Brooks.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

Opinions Below.

The opinion of the United States Board of Tax Appeals (R., 12-22) is reported in 22 B. T. A., 71. The opinion of the Circuit Court of Appeals (R., 47-51) is reported in 60 F. (2d), 890.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered August 5, 1932 (R., 51). It affirmed a determination of the United States Board of Tax Appeals reducing to $1.79 a deficiency in estate tax claimed by the petitioner to be $24,865.88 (R., 5, 22, 51). The petition for certiorari was filed November 4, 1932, and granted December 5, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Involved.

The issues for the present consideration of the Court are:

(1) Whether or not the estate tax imposed by the Revenue Act of 1924 applies (a) to shares of stock in a foreign corporation and (b) to bonds of foreign corporations, bonds of foreign governments, bonds of domestic corporations and bonds of domestic municipalities, owned by a *non-resident alien decedent*, not engaged in business in the United States at the time of his death, where the paper evidences of such securities were located within the United States at the time of his death; and

(2) Whether or not the estate tax imposed by the Revenue Act of 1924 applies to a deposit by a *non-resident alien decedent*, not engaged in business in the United States at the time of his death, with the firm of Lawrence Turnure & Company, New York City.

The Statute.

The pertinent provisions of the Revenue Act of 1924, c. 234, 43 Stat., 253, are as follows:

"Sec. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or non-resident of the United States:

(Here follow the rates.)

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

* * * * * *

Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

* * * * * *

(b) In the case of a non-resident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

* * * * * *

(d) For the purpose of Part I of this title, stock in a domestic corporation owned and held by a

non-resident decedent shall be deemed property within the United States, * * *.

(e) The amount receivable as insurance upon the life of a non-resident decedent, and any moneys deposited with any person carrying on the banking business, by or for a non-resident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of Part I of this title, be deemed property within the United States."

Statement of Facts.

Respondents are the executors of the estate of Ernest Augustus Brooks, who died on October 31, 1924 (R., 8).

At the time of his death, Ernest Augustus Brooks was a resident of Cuba, and a subject of Great Britain. He was not engaged in business within the United States (R., 8).

The decedent's last will and testament was executed in Cuba and filed in accordance with the Cuban statutes with a Cuban notary public. The respondents were named as executors in that will, which contained a direction, permissible under Cuban law, that administration of the estate be carried on without judicial intervention (R., 38-40).* In order to secure the release of certain assets, probate proceedings were initiated in New York, in connection with which New York transfer tax proceedings were had (R., 42).*

At the time of his death, the decedent was the owner of shares of corporate stock and bonds as follows (R., 8; full list with values shown at R., 8, 9, 10 and 11):

*These facts are not included in the findings, but appear in the record at the pages cited.

Bonds of foreign corporations and accrued interest thereon of an aggregate value of	$24,384.97
Bonds of foreign governments and accrued interest thereon of an aggregate value of	55,610.49
Bonds of domestic corporations and accrued interest thereon of an aggregate value of	460,315.32
Bonds of a domestic municipality and accrued interest thereon of an aggregate value of	15,073.57
Stock in a foreign corporation of an aggregate value of	50,000.00
	$605,384.35

The paper evidences of part of the foregoing securities were in the possession of decedent's son, Ernest Brooks, in New York City. He collected the income therefrom and deposited the same in his father's bank account (R., 11).

The paper evidences of the remaining securities were in the possession of Lawrence Turnure & Company, in New York City. That firm collected the income therefrom and placed the same to decedent's credit subject to his check (R., 11).

None of these securities was pledged or held as security for any indebtedness (R., 11).

The 666 shares of capital stock of the Central Romelie S. A. Cuba Joint Stock Co. were shares of stock in a corporation, organized under the laws of Cuba (R., 11), operating a sugar business in Cuba (R., 35).*

The foregoing securities were all included by the petitioner in determining the value of that part of the

*This fact is not included in the findings, but appears in the record at the page cited.

gross estate of the decedent which at the time of his death was situated in the United States (R., 11).

At the time of his death, decedent had a drawing account with the firm of Lawrence Turnure & Company, New York City, in which that firm placed the income from the decedent's securities in its possession and against which the decedent from time to time had drawn checks (R., 11). Such checks were honored by Lawrence Turnure & Company (R., 38-39).* The balance of $14,517.98 on deposit at the date of death was included by the petitioner in determining the value of that part of the gross estate of the decedent which at the time of his death was situated in the United States (R., 11).

The Board of Tax Appeals held that none of the foregoing securities or the foregoing deposit was properly included in the gross estate (R., 11). Its decision has been affirmed by the Circuit Court of Appeals for the Second Circuit (R., 47-50). The majority of that Court based the affirmance upon their opinion (which was the view of the Board of Tax Appeals) that the statute does not reach the property involved (R., 50). Judge Learned Hand (concurring) relied more "upon the fact that if the Treasury be right" in its claims as to the construction of the statute, "the act is open to very grave constitutional doubts" (R., 51).

Specifications of Error.

The petitioner urges that the Circuit Court of Appeals erred—

1. In failing to hold that the stocks, bonds, and cash on deposit were property situated in the United States within the meaning of Section 303 (b) of the Revenue Act of 1924.

*This fact is not included in the findings, but appears in the record at the page cited.

2. In holding that the Revenue Act of 1924 did not require the inclusion in the gross estate of a non-resident decedent of the value of intangible property the physical evidences of which are actually present in the United States.

3. In affirming the decision of the Board of Tax Appeals (p. 4 of petition for Writ of Certiorari; p. 4, Petitioner's Brief).

Summary of Respondents' Argument.

The exclusive situs for estate tax purposes of intangible property owned by a non-resident alien decedent and consisting of government, corporate and municipal bonds, stock of a foreign corporation and a debt owed by a resident debtor, is at the domicile of the decedent, where, as here, none of such property has a "business situs" elsewhere.

The Revenue Act of 1924 does not attempt to change such situs.

A Federal statute which attempted to change such situs could not succeed in doing so, because it would be repugnant to the Fifth Amendment to the Constitution of the United States.

ARGUMENT.

I.

The Revenue Act of 1924 does not treat intangibles consisting of stock of a foreign corporation and bonds, the paper evidences of which are physically present in the United States, and of a debt due from a domestic debtor, as property situated in the United States.

The Revenue Act of 1924 imposes a tax "upon the *transfer* of the net estate of every decedent dying after

the enactment of this Act, whether a resident or non-resident of the United States" (Section 391 [a]).

The Act provides for the valuation of the gross estate of the decedent (Section 302) and provides that the net estate shall be determined by making certain deductions from the gross estate (Section 303). In the case of a non-resident decedent, the Act provides that the net estate shall be determined by making these deductions "from the value of that *part* of his gross estate which at the time of his death is *situated in the United States*" (Section 303[b]). (Italics ours.)

Congress has specifically provided in this Act (Section 303 [d]) that for purposes of taxation under the Act, shares of stock of *domestic* corporations owned by a non-resident decedent shall be deemed to be "situated in the United States." The Act contains no provision purporting to fix the situs of shares of stock of *foreign* corporations or bonds of any description owned by a non-resident decedent, or debts due him from domestic debtors.

The shares of corporate stock here involved were those of *a Cuban corporation doing business in Cuba* (R., 33, 11). The decedent was a *resident of Cuba* and a *subject of Great Britain.* The stock certificates representing such shares were in the United States at the date of his death. The petitioner included these shares in the gross estate as being property "situated in the United States" (R., 11).

The bonds here involved were the obligations of foreign corporations, foreign municipalities, domestic corporations and a domestic municipality. The paper evidences of these obligations were in the United States at the date of the decedent's death. The petitioner included these obligations in the gross estate as being property "situated in the United States" (R., 8-11).

The debt here involved was that of a domestic debtor. The petitioner included this debt in the gross estate as

being property "situated in the United States" (R., 8, 11).

The statute does not attempt to define the phrase "situated in the United States." The primary question, therefore, is what the Congress meant by that phrase.

In considering that question it will be found that other provisions of the statute are not only consistent with the construction of the statute for which we contend, but that they are consistent only with that construction; and also that the state of the law regarding the tax situs of intangibles as declared by this Court at the time of the passage of the Revenue Act of 1924 is compelling in favor of that construction.

As to the latter, the position taken in the petitioner's brief (pp. 8-10) discloses a misconception of what this Court had actually held prior to 1924. The fact is that this Court prior to that date had consistently recognized the common law doctrine of *mobilia sequuntur personam* as fixing the situs of intangible property at the domicile of the owner, but had conceded to taxing authorities the power (since denied them, except possibly where the intangibles have acquired a "business situs" elsewhere) of fixing an additional situs by express statutory provision.

Railroad Company vs. *Pennsylvania* (*State Tax on Foreign-Held Bonds*), 15 Wall., 300;
Kirtland vs. *Hotchkiss*, 100 U. S., 491;
New Orleans vs. *Stempel*, 175 U. S., 309;
Eidman vs. *Martinez*, 184 U. S., 578;
Blackstone vs. *Miller*, 188 U. S., 189;
Buck vs. *Beach*, 206 U. S., 392;
Wheeler vs. *Sohmer*, 233 U. S., 434.

In *Railroad Company* vs. *Pennsylvania* (supra), the opinion reads at page 320:

"But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors, is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicil, wherever that may be. *Their debts can have no locality separate from the parties to whom they are due.* This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement." (Italics ours.)

In *Kirtland* vs. *Hotchkiss* (supra), Connecticut imposed a tax on a debt owing to a resident of Connecticut by a resident of Illinois and secured by a mortgage on property situated in Illinois. This Court held that the tax was properly imposed because the debt was property in the hands of the creditor and was situated at the place of his domicile, namely, Connecticut.

In commenting on *Kirtland* vs. *Hotchkiss* (supra), this Court in *New Orleans* vs. *Stempel* (supra), stressed the necessity of a specific statutory provision in order to create a situs other than the domicile of the creditor in the following language at page 321:

"It was assumed that the situs of such intangible property as a debt evidenced by bond was at the domicil of the owner. *There was no legislation attempting to set aside that ordinary rule in respect to the matter of situs.*" (Italics ours.)

In *Eidman* vs. *Martinez* (supra), the question involved was whether the inheritance tax provisions of the War Revenue Act of 1898 reached federal, municipal and corporate bonds, the physical evidences of which were in the custody of a non-resident alien decedent's agent in New York. This Court construed the Act as not reaching any property passing under the will of a non-resident alien and thus was not under the necessity of passing upon the situs of the particular property in question. However, the opinion discusses at length the maxim *mobilia sequuntur personam*, and concludes:

> "Conceding it to be within the power of Congress to impose an inheritance tax upon property in this country, no matter where owned or transmitted, it has not done so in this case * * *."

DeGanay vs. *Lederer*, 250 U. S., 376, upon which the petitioner relies for support for his argument that the Congress must have intended to reach by the Statute intangibles of the character of those in the case at bar, does not, in fact, support his argument. That case does not reject the maxim *mobilia sequuntur personam*. In applying the *income tax provisions* of the 1913 Act this Court did, as petitioner points out, hold that the maxim did not apply to the situation there presented, but the petitioner has failed to point out the reason, which, as emphasized in the opinion of this Court, was that the property from which the income was derived had acquired a business situs in the United States because that property was a fund which had been invested and reinvested since 1885 in the United States by the owner's agent domiciled here. The distinction between this sort of situation and the situation in the case at bar is well illustrated in *Ewa Plantation Co.* vs. *Wilder*, 289 Fed., 664 and *Hill* vs. *Carter*, 47 Fed. (2d), 869, certiorari denied 284 U. S., 625. These two cases plainly demon-

strate that the intangibles in the case at bar had no business situs in the United States. In each of them Hawaii was seeking to tax the income of its resident from property owned in Hawaii. In the latter of them the facts were as in the *DeGanay* case and the decision was that *mobilia sequuntur personam* therefore did not apply, the property was not in Hawaii and the income from it was not taxable. In the former the facts were as in the case at bar and the decision was that *mobilia sequuntur personam* did apply, the property was in Hawaii and the income from it was taxable.

The petitioner cites *Kepner* vs. *United States*, 195 U. S., 100, 124, for the proposition that it is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. He argues therefrom that a tax imposed upon the transfer of the property "situated in the United States" must be deemed to have been imposed upon intangibles, which under the decisions of the Court had a situs here for the purposes of taxation. His argument loses all force when it is considered that what this Court had held prior to 1924 was not that intangibles had a general situs for taxation where the evidences thereof were found, *but that they might be given such a situs by a statute so providing.*

We, therefore, repeat that at the time of the passage of the Revenue Act of 1924, the law was plainly laid down that the taxable situs of intangible personal property was normally at the domicile of the owner regardless of the place where the paper evidences of such property might be and that the then admitted power of taxing authorities to create an additional situs must be exercised by a statute clearly evidencing such intent, for in every case in which an additional situs was allowed this Court found in the taxing statute itself affirmative evidence of an intent to fix such additional situs or found

itself bound by the decision of the State Court that such intent existed.

In this state of the declared law it is very clear that if the Congress had intended to attempt to fix a situs for intangibles for purposes of the estate tax provisions of the Revenue Act of 1924 at the place where the physical evidences of the intangible property were found, it would have recognized the necessity of plainly so declaring. It did not do so. Instead, what do we find?

(1) We find no definition in the Act of the phrase "situated in the United States."

(2) We find it provided in Section 303 (d) that stock in a domestic corporation *shall* be deemed property within the United States. No similar provision is made as to stock in foreign corporations or bonds. The express inclusion of the one class of property obviously implies the exclusion of the others. *Expressio unius est exclusio alterius.* The petitioner argues that by the provision last referred to Congress intended to add to all intangibles, paper evidences of which are within the United States, the stock of domestic corporations, irrespective of the location of the certificates of stock. This argument provokes the comment that if this were indeed the Congressional intent the language used is singularly inappropriate for the purpose. On petitioner's theory stock in a domestic corporation is "situated in the United States" if the stock certificates are here. If this be so, then what Congress would have done in order to bring all stock in domestic corporations within the statute would have been to insert a provision that stock in domestic corporations shall be deemed property within the United States in cases where the stock certificates are located elsewhere.

(3) We find it provided in Section 303 (e) that the amount receivable as insurance upon the life of a non-

resident decedent shall *not* be deemed property within the United States.

It is argued by the petitioner (pp. 13-14 of his brief) that the express exclusion of the proceeds of life insurance policies (a type of intangible personal property) even though the debtors or the insurance policies might be in the United States, implies that other intangibles similarly situated and not so excepted shall be deemed to be property situated within the United States. Exactly the contrary conclusion must be reached when consideration is given to the history of this provision.

This provision was first introduced in the Revenue Act of 1921 as Section 403 (b) (3) of that Act, to *repeal* the following provision contained in Section 403 (b) (3) of the Revenue Act of 1918:

> "* * * the amount receivable as insurance upon the life of a non-resident decedent where the insurer is a domestic corporation, shall be deemed property within the United States. * * *"

The purpose of this repealer is made plain by the report of the Committee on Finance (Report No. 275, 67th Congress, First Session), with respect to the Revenue Act of 1921, which contains the following statement on page 25:

> "Section 403 (b) (3). Under existing law the proceeds of insurance upon the life of a non-resident decedent, where the insurer is a domestic company, is deemed property within the United States. This has been found to place American insurance companies at a disadvantage in competing with foreign companies, and, in order to remedy this situation, the proposed bill expressly states that such insurance shall not be regarded as property situated in the United States."

In the light of this history of Section 303 (e) of the Revenue Act of 1924, it is evident that Congress, when enacting that provision, regarded a tax upon insurance upon the life of a non-resident decedent as an *exception* to the general rule; otherwise, it would not have enacted the provision above quoted from the Revenue Act of 1918. In singling out such insurance and imposing a tax thereon, Congress implied the intention to exclude from taxation all other intangible personal property belonging to non-resident decedents, whether or not the debtor or the evidence of the debt was in the United States. If Congress had intended to include and attempt to subject to taxation such other intangible personal property, it would have expressly so provided, as it did in the case of insurance by Section 403 (b) (3) of the Revenue Act of 1918, and as it did in the case of shares of stock of *domestic* corporations by Section 303 (d) of the Revenue Act of 1924.

These provisions with reference to insurance and shares of stock in domestic corporations indicate clearly that the Congress intended the general rule (domicile of the owner) to apply to all classes of intangible personal property not specifically dealt with in the statute.

(4) We find it also provided in Section 303 (e) that any moneys deposited with any person carrying on the banking business, by or for a non-resident decedent who was not engaged in business in the United States at the time of his death, shall *not* be deemed property within the United States.

Here again it is argued by the petitioner (pp. 13-14 of his brief) that the express exclusion of such moneys (a type of intangible personal property), even though the debtors or the physical evidences of the debts might be in the United States, implies that other intangibles similarly situated and not so excepted shall be deemed

to be property within the United States. Here again exactly the contrary conclusion must be reached. The effect of the petitioner's argument is that the Congress by expressly providing that the domicile of the debtor in such cases shall not be deemed the situs of the debt for purposes of taxation under the Act, intended that as to all other debts the domicile of the debtor should be taken as the situs of the debt for the purpose of subjecting such other debts to taxation under the Act. There might be some force to such an argument if under the general rule of situs a debt were situated at the domicile of the debtor, but the general rule, as already stated, is that the situs of a debt is at the domicile of the *creditor*. Therefore, the provision above quoted from Section 303 (e), instead of being an exception to the general rule, is merely an *express* application of the general rule to such bank deposits. It is well known that this provision, first inserted in the Revenue Act of 1921, was a response to expressed desires on the part of the banking interests of the country to make it the financial center of the world by giving non-residents an *express* assurance that the maintenance of bank balances here would not involve a tax.

Furthermore, there is ground for the belief that the Congress thought of such moneys as tangible rather than intangible property. While technically the relation between bank and depositor is merely that of *debtor and creditor*, the ownership of the moneys deposited being vested in the bank when deposited, this legal relationship has sometimes been ignored and the situation treated as if the depositor were the owner of moneys in the custody of the bank. In other words, a depositor is sometimes deemed to be the owner of the tangible property, i. e., the *specie* in the bank. (See *New Orleans* vs. *Stempel*, supra, at p. 316; *Blackstone* vs. *Miller*, supra, at p. 205.)

The provision above quoted from Section 303 (e) by providing that "moneys" deposited with any person carrying on the banking business by or for such non-resident decedent shall "not be deemed property" within the United States, in effect maintains the legal relationship between bank and depositor (that of debtor and creditor) in respect of such bank deposits. Under this provision such bank deposits cannot legally be treated as tangible property belonging to the depositor.

The inclusion in the statute of the three provisions just discussed compels the conclusion that the Congress intended that the rules of the common law should apply in all other respects in the determination of whether or not any item of property owned by a non-resident decedent is situated within the United States.

It may be noted that all the cases which have passed upon the construction of the statute are in harmony with the views hereinabove expressed.

Estate of Garvan vs. *Commissioner,* 25 B. T. A., 612;
Shenton vs. *United States,* 53 Fed. (2nd), 249;
Sanchez vs. *Bowers,* 57 Fed. (2nd), 324.

In *Shenton* vs. *United States* (supra), the District Court for the Southern District of New York passed upon the precise question herein involved. The Court held that intangible property represented by warrants, located in the United States, for stock of a foreign corporation was not subject to tax when owned by a non-resident decedent. At page 250, the opinion reads:

> "In construing the statute it should be recognized that there is no express provision to the effect that stock is to be included in computing the tax merely because the certificate for it is situated within the

United States; and on the other hand there is the express clause that stock owned by a non-resident decedent is to be included, provided it is stock of a domestic corporation. The general rule is that the legal situs of personal property including stock is the domicile of the owner, though frequently tax statutes contain express provisions, such as the above mentioned clause, making the situs of stock the place of incorporation of the company issuing it. If it is intended to constitute the place where the certificate of stock physically exists as the taxable situs of the stock, that intention should clearly appear because it is contrary to the general current of thought and because, furtner, tax statutes should be strictly construed against the Government. The statute in question does not disclose such clear intention to include stock merely on the ground that its certificate is physically located in this country; but, on the contrary, there appears an affirmative intention to limit the tax to such stock as was owned by a resident decedent or issued by a domestic corporation. This was specifically held by the Board of Tax Appeals in Brooks vs. Commissioner, 22 B. T. A., page 71."

The petitioner in his brief (pp. 11-13, 15-16) stresses the argument that the construction placed by the related regulations upon language in prior and similar Revenue Acts, which is similar to the language found in the Revenue Act of 1924, shows an implied adoption by the Congress in the latter Act of the regulations issued under prior Acts. The Court below rightly dismissed petitioner's argument (R., 49). The petitioner goes too far in citing *National Lead Company* vs. *United States,* 252 U. S., 140, 146 and *Brewster* vs. *Gage,* 280 U. S., 327, 337, for the proposition that the regulations upon which he relies

have the force of law and are not to be disregarded without cogent reasons. The most that these two authorities can be said to hold is that regulations which are reasonable and do no violence to the letter or spirit of a statutory provision or which construe an ambiguous or doubtful statute, may sometimes be held to find legislative approval in the subsequent reenactment of such statute. However far the theory of legislative adoption of such regulations may have gone, it has not gone and cannot go to the length of permitting legislation by regulations which are contrary to the proper and natural construction of the related statute or which contravene the familiar rule that tax statutes should be construed strictly against the taxing authority and liberally in favor of the taxpayer.

Eidman vs. *Martinez,* 184 U. S., 578, 583;
Gould vs. *Gould,* 245 U. S., 151.

The petitioner's argument with respect to the regulations is fallacious—on the one hand the argument is made that bonds of a non-resident are property in the United States because the regulations under prior Acts say so, although the 1924 Act does not, and on the other hand it is argued that stock of a foreign corporation owned by a non-resident is property within the United States—although not declared to be such either by prior regulations or the 1924 Act—because the prior regulations must not be deemed to limit the estate tax to the class of intangibles therein mentioned. It is respectfully submitted that this Court will not sanction the exaction of taxes upon any such doubtful evidence of Congressional intent. The fact is that in so far as bonds are concerned the prior regulations proceeded upon a theory contrary to the common law rule (Article 53, Regulations 63, Revenue Act of 1921), while by their silence as to stock of foreign corporations they adopted the common law rule.

There is certainly no warrant in the statutes preceding the 1924 Act for any such distinction. It is, therefore, impossible to place any reliance upon the theory of a legislative adoption of the prior regulations by the 1924 Act (see *Shenton* vs. *United States,* supra, at pp. 250-251).

Moreover, an examination of the income tax provisions of the Revenue Act of 1924 and of its predecessor, the Revenue Act of 1921, furnishes convincing proof that the Congress did not intend to adopt the earlier regulations relating to the estate tax sections of those Acts. In Section 217 of the Revenue Act of 1924 and in Section 217 of the Revenue Act of 1921 elaborate and detailed definition is made of what is and what is not income of a non-resident alien from sources within the United States. These provisions are much more detailed and involved than the estate tax sections of the 1924 Act and the related regulations combined. It is obvious that when the Congress went to such pains to define the income of a non-resident alien in the 1924 Act, it would have done the same with the estate tax provisions by at least incorporating in them the regulations under prior Acts if it wanted to adopt such regulations. There might be some ground for argument of the adoption of regulations in this case if the Congress in the estate tax sections of the 1924 Act had merely declared a tax upon the transfer of property "situated in the United States." But when the Congress went on to qualify that phrase by the provisions of Section 303 (d) and (e) above discussed, it must be concluded that the Congress inserted in the statute itself such definition and qualification of the phrase as it intended to make and its omission under such circumstances to carry the provisions of prior regulations into the statute itself negatives their implied adoption.

Finally, while we do not for the reasons heretofore given regard the statute as ambiguous, if it should be

so regarded, the construction of it adopted by the Court below should be affirmed as not raising any constitutional question. (*Brewster* vs. *Gage*, supra, at p. 335.)

It follows from the considerations above advanced that the Court below was right in deciding that the Revenue Act of 1924 does not reach the property here involved for purposes of the imposition of an estate tax upon its transfer.

II.

The Revenue Act of 1924 if given the construction for which the petitioner contends would be repugnant to the Fifth Amendment to the Constitution of the United States.

If, as we submit has been clearly shown, the Revenue Act of 1924 does not attempt to subject the transfer of the decedent's bonds, stock and moneys on deposit to the estate tax, the petitioner's arguments in support of the power of the Congress to do so do not require an answer. But if it should be held that such was the intent of the Congress, it is readily demonstrable by an unbroken line of decisions of this Court that it was ineffective because in violation of the due process clause of the Fifth Amendment.

In *State Tax on Foreign-Held Bonds* (supra), this Court said:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects."

While the foregoing quotation deals with the power of a State to tax, the rule applies with equal force to the power of the Federal Government.

Heiner vs. *Donnan*, 285 U. S., 312.

This decision declared unconstitutional as in violation of the Fifth Amendment a provision of the Revenue Act of 1926 purporting to establish a conclusive presumption that transfers made within two years prior to death shall be deemed to have been made in contemplation of death. In so doing, this Court followed *Schlesinger* vs. *Wisconsin*, 270 U. S., 230, which declared a similar provision in a State statute unconstitutional. The opinion in the *Heiner* case reads, at page 326:

> "Nor is it material that the 14th Amendment was involved in the Schlesinger Case, instead of the 5th Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. Coolidge vs. Long, 282 U. S., 582, 596, 75 L. ed., 562, 566, 51 S. Ct., 306. That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment is settled. Nichols vs. Coolidge, 274 U. S., 531, 542, 71 L. ed., 1184, 1192, 52 A. L. R., 1081, 47 S. Ct., 710; Brushaber vs. Union P. R. Co., 240 U. S., 1, 24, 25, 60 L. ed., 493, 36 S. Ct., 236, Tyler vs. United States, supra (281 U. S., p. 504, 74 L. ed., 998, 69 A. L. R., 758, 50 S. Ct., 356)."

And the protection of the provisions of the Fifth Amendment extends to the alien friend.

Russian Volunteer Fleet vs. *United States*, 282 U. S., 481, 489.

Since the respondents' decedent was a non-resident alien, the United States did not have that power over him and his property which the relations of citizenship and domicile, or of either of them, might have given, and the United States could therefore tax the transfer of only such of his property as had a situs within its jurisdiction.

The record here stands undisputed that the respondents' decedent was not within the jurisdiction of the United States and that neither he nor his property was engaged or employed in business here (R., 8, 11). Under these circumstances his intangibles were not within the jurisdiction of the United States.

Whatever doubts may have existed prior to 1930 as to the situs of such intangibles for purposes of taxation have been resolved by the recent decisions of this Court and it is now firmly established that as to such intangibles the maxim *mobilia sequuntur personam* applies and their *only* situs for taxation is the domicile of their owner, except possibly in the case where they have become integral parts of a business localized in another jurisdiction.

Farmers Loan & Trust Co. vs. *Minnesota,* 280 U. S., 204;
Baldwin vs. *Missouri,* 281 U. S., 586;
Beidler vs. *South Carolina Tax Commission,* 282 U. S., 1;
First National Bank of Boston vs. *Maine,* 284 U. S., 312.

These cases determine effectively and completely in respondents' favor the constitutional question now under discussion because, although they deal with the power of the States to tax, they are made clearly applicable to the power of the United States to tax by the decision of this Court in *Heiner* vs. *Donnan* (supra).

In *Farmers Loan & Trust Company* vs. *Minnesota* (supra), it was held (citing *Blodgett* vs. *Silberman*, 277 U. S., 1) that bonds are to be treated as ordinary choses in action and that the attempted imposition by Minnesota of an inheritance tax in respect of bonds of Minnesota and of the cities of Minneapolis and St. Paul owned by a resident of New York was violative of the Fourteenth Amendment. *Blackstone* vs. *Miller*, 188 U. S., 189, which stood for a contrary doctrine was definitely overruled as no longer a correct exposition of existing law.

In *Baldwin* vs. *Missouri* (supra), the attempted imposition by Missouri of an inheritance tax in respect of deposits in Missouri banks and United States bonds and promissory notes, most of which were made by Missouri citizens and secured by liens on lands in Missouri and all owned by a resident of Illinois, was likewise held violative of the Fourteenth Amendment, *although the bonds and notes were physically within Missouri.*

Stocks and bonds are both intangible property and no distinction can be made between them for purposes of death duty taxation (*First National Bank* vs. *Maine*, supra, at pages 327-328). Therefore, the *Missouri* and *Maine* cases alone furnish all the authority necessary to support our contention that the Congress cannot tax the transmission of the bonds, stock and moneys on deposit owned by respondents' decedent.

In *Beidler* vs. *South Carolina* (supra), the attempted imposition by South Carolina of an inheritance tax in respect of a debt due by a South Carolina corporation to a resident of Illinois was likewise held violative of the Fourteenth Amendment.

Finally in *First National Bank* vs. *Maine* (supra), the attempted imposition by Maine of an inheritance tax in respect of stock of a Maine corporation owned by a resident of Massachusetts was likewise held violative of the Fourteenth Amendment.

The *ratio decidendi* of all four of these cases, although they deal with the power of the States to tax the transfer of intangibles of non-resident decedents, applies with equal cogency to the power of the United States to tax the transmission of intangibles belonging to a decedent who was neither a citizen nor a resident of the United States. It is thus expressed in the *Maine* case (supra) at pages 326 and 327:

> "It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently, it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last cited" (i. e., the *Minnesota, Missouri* and *South Carolina* cases) "that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment.
>
> "The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time.
>
> "In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logi-

> cal self contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there. * * *
>
> "A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; * * *."

The possibility that intangibles might be so employed in a taxing jurisdiction other than that of their owner as to acquire a "business situs" and be subject to taxation there has been already referred to. This Court has so held in dealing with a Virginia personal property tax statute (*Safe Deposit & Trust Company* vs. *Virginia*, 280 U. S., 83) and with the Federal income tax statute (*DeGanay* vs. *Lederer*, 250 U. S., 376) as well as in certain earlier cases.*

And in the *Maine* case (supra) it is written at page 331:

> "We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See Farmers Loan &

*It should be noted, however, that in the *Virginia* case the physical evidences of the intangibles involved were outside of Virginia in the possession of a Trustee domiciled in Maryland, who had the legal title. The actual point decided was that Virginia could not reach them to impose a personal property tax based on the domicile in Virginia of the *cestuis* of the trust and the application of the maxim *mobilia sequuntur personam*. The decision might well have been based solely--as it was in part—upon the distinction between legal and equitable ownership and the application of the maxim to the former only without regard to the location of the physical evidences of the intangibles.

T. Co. case, supra (280 U. S., 213, 74 L. Ed., 375, 65 A. L. R., 1000, 50 S. Ct., 98). That question heretofore has been reserved, and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration."

The petitioner advances the argument at pages 27 to 29 of his brief that the intangibles involved in the case at bar had acquired a "business situs" in the United States. The Board of Tax Appeals made no such finding and the petitioner did not in the Court below (R., 26-27) and does not in this Court (Petition for Writ, p. 4; Petitioner's Brief, p. 4) specifically assign the failure to make such finding as error. It is, therefore, submitted that the question is not raised by the petitioner's specifications of error. But if the question were here, the petitioner's argument has no merit.

It is beyond dispute that the decedent was *not* at the time of his death engaged in business in the United States (R., 8). The physical evidences of his intangibles were in the possession of his son and of Lawrence Tunure & Company for the purpose of collecting the income and depositing it to decedent's credit (R., 11) and for no other purpose. On this state of facts *Baldwin* vs. *Missouri* (supra) is express authority that the decedent's intangibles had no "business situs" in the United States.

Such cases in this Court and elsewhere as support the "business situs" theory as applied to the use of intangibles have never gone beyond the point of finding a "business situs" to exist when a non-resident, through an agent, has employed his assets in a jurisdiction other than that of his domicile for purposes of trade or of investment and reinvestment (e. g., *Bristol* vs. *Washington County*, 177 U. S., 132; *Metropolitan Life Ins. Co.* vs. *New Orleans*, 205 U. S., 395). The petitioner is mistaken when he writes at page 29 of his brief that there was no such element in *New Orleans* vs. *Stempel* (175

U. S., 309). An examination of the opinion (p. 316) shows the contrary, as was noted by Mr. Justice McKenna in his concurring opinion in *Wheeler* vs. *Sohmer* (233 U. S., 434, 441-442).

The decision in *DeGanay* vs. *Lederer* (250 U. S., 376), referred to by petitioner at page 28 of his brief, is not inconsistent with what is written above. In that case a citizen and resident of France had in 1885 placed in the hands of her agent domiciled in Pennsylvania property which the agent, acting under power of attorney, had invested and reinvested down to 1913 in mortgages upon Pennsylvania lands, and stocks and bonds of corporations organized under the laws of the United States. The agent held the physical evidences of the property. The question presented as stated in the opinion was whether income from this property was income derived from property owned in the United States within the meaning of the Revenue Act of 1913. This Court held that it was, basing its decision largely on *Blackstone* vs. *Miller* (188 U. S., 189) and kindred cases and referring to four elements as completely localizing in the United States the property from which the income was derived: (1) the fact that the stocks and bonds were those of corporations organized under the laws of the United States, (2) the fact that the mortgages were secured upon Pennsylvania property, (3) the fact that the certificates of stock, and physical bonds and mortgages were in Pennsylvania, and (4) the power of investment and reinvestment of the agent. This decision might well have been based solely upon element (4) as evidencing that the nonresident's fund was employed in business in the United States. It must find its support there or in the provision of the 1913 Act taxing the income of every business carried on in the United States by persons residing elsewhere if it is to be regarded as any longer a correct decision under the law as laid down by this Court since

January, 1930. Elements (1), (2) and (3) are no longer admissible considerations since the decisions of this Court in the *Minnesota, Missouri, South Carolina* and *Maine* cases (supra). It is only upon the theory just expressed that the conclusion can be avoided that the *DeGanay* case is one of the "approving opinions" which fell when this Court in *Farmers Loan & Trust Co.* vs. *Minnesota* (supra), overruled *Blackstone* vs. *Miller* (supra). See *First National Bank* vs. *Maine* (supra), at page 324. This point of view is, we think, recognized in *Hill* vs. *Carter* (supra), in which the Circuit Court of Appeals for the Ninth Circuit expressed the view that *DeGanay* vs. *Lederer* (supra), has not been overruled.

The other arguments advanced by the petitioner in support of the constitutionality of the statute are also readily answered.

It is hardly fair to imply, as petitioner does at page 17 of his brief, that the sole motive which actuated this Court in deciding in the *Minnesota* and kindred cases that intangibles are subject to death duties only at the decedent's domicile* was to avoid multiple taxation by the States and secure parity between tangibles and intangibles. Undoubtedly that is a consideration which appeals strongly to the Court. But the decisions which we find controlling upon the case at bar rest upon a far broader base. That base is "the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which can not take place in two or more states at one and the same time" (*First National Bank* vs. *Maine* [supra], at p. 326). Since "due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state

*With the possibility of a "business situs" left open.

carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there" (ibid., pages 326-327) and since in a case arising from an attempt by New York to tax the transmission of this decedent's stock, bonds and moneys on deposit, this Court would hold that their transmission did not occur in New York (vide the *Missouri* case, supra), but did take place in Cuba, it is inconceivable that in the case at bar the Court could hold the contrary. The maxim *mobilia sequuntur personam* may not be one of invariable application, but to suggest that it may be applied to a State statute and not applied to a parallel Federal statute which seeks to reach the same transfer of the same property is to suggest an inconsistency which, we submit, this Court will not countenance.

We do not object to this tax—as the petitioner seems to think (p. 22 of his brief)—upon the ground that it involves taxation both by a State and the Federal Government. We insist that neither jurisdiction can impose the tax. Nor do we make a point of international double taxation, although it were well avoided. It may be that Great Britain might tax the transmission of the decedent's intangible property upon the ground of his citizenship and Cuba might tax it—as it could his Cuban real estate—upon the ground of his domicile and its consequent presence there. What we do insist is that the United States cannot impose the tax because, under the controlling decisions of this Court, the decedent's intangible property has no more situs for taxation here than has his Cuban real estate.

We dispute the statement made at pages 23 and 24 of petitioner's brief, if by it he intends to assert that the Fifth Amendment does not restrain the taxing power of the Federal Government to the same extent that the taxing power of the States is restrained by the Four-

teenth Amendment. *Heiner* vs. *Donnan* (supra), holds the restraint imposed by the due process clauses of the two Amendments is the same. The petitioner cites *United States* vs. *Bennett* (232 U. S., 299) and *Cook* vs. *Tait* (265 U. S., 47), as supporting his contention.

The opinion in the first of these cases cannot be read in its entirety without an instant realization of the fact that the situs of property had nothing to do with the decision, the salient feature of which was that a *citizen* of the United States, domiciled here, might be taxed in respect of a foreign-built yacht, even though the yacht had not been within the territorial jurisdiction of the United States during the period covered by the tax. That the basis of the power to tax was *the citizenship of the taxpayer* is made doubly clear by *United States* vs. *Goelet* (232 U. S., 293), decided at the same time, in which the facts were identical except that the citizen was permanently domiciled abroad, and in which this Court held that the taxing statute should not be construed to apply, although "not in the slightest degree questioning that there was power to impose the excise duty on the citizen owning a foreign-built yacht wholly irrespective of the fact that he was permanently domiciled in a foreign country."

Cook vs. *Tait* (supra), likewise stands for the proposition that a non-resident *citizen* may be taxed in respect of his income derived from property having its situs abroad, this Court stating the reason at page 56:

> "In other words, the principle was declared that the government, by its very nature, benefits the citizen and his property, wherever found, and therefore has the power to make the benefit complete. Or, to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or

> out of the United States, nor was not and cannot be made dependent upon the domicil of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States, and the relation of the latter to him as citizen. The consequence of the relations is that the native citizen who is taxed may have domicil, and the property from which his income is derived may have situs, in a foreign country, and the tax be legal,—the government having power to impose the tax."

These three last cited cases have no application to the case at bar both because of the fact that the decedent here was a non-resident alien and because of the legal principle that situs within the taxing jurisdiction is necessary to the imposition of a tax upon the transmission of property at death (*Frick* vs. *Pennsylvania,* 268 U. S., 473).

Obviously in the present state of civilization and under our form of government the tax sought by the Treasury in this case cannot be exacted merely because the government has the physical power to collect it, as the petitioner suggests at page 26 of his brief. Might does not make right in this country. If such an exaction were possible the States in the *Minnesota, Missouri, South Carolina* and *Maine* cases (supra) would have proceeded to enforce their assessments. But as to the States the Fourteenth Amendment stands in the way. And as to the Federal government the Fifth Amendment is just as effective a bar. It would be begging the question to say that a distinction exists because the United States might coerce the States while there is no one to coerce the United States.

Petitioner's *quid pro quo* argument (Petitioner's Brief, pages 26-27)—his contention that protection furnished by the United States to the physical evidences of the decedent's intangible property requires and justi-

fies the exaction of a tax upon its transmission is baseless for at least two reasons. In the first place, the tax is not a tax levied in exchange for protection of property but solely upon the privilege of transmission of property. That privilege in the case at bar was not granted by the United States or any State of the Union. In the second place, whatever protection was afforded the property was furnished not alone by the United States, but to an equal or greater degree by the State of New York. Yet New York cannot tax its transmission (*Baldwin* vs. *Missouri,* supra) on that account. Since New York cannot, neither can the United States.

Whether or not other countries do not, as asserted at page 27 of petitioner's brief, permit the maxim *mobilia sequuntur personam* to be invoked in favor of non-residents is entirely immaterial. This is clear from what this Court recently wrote in *Russian Volunteer Fleet* vs. *United States* (supra), at pages 491-492, in referring to another clause of the Fifth Amendment.

> "As alien friends are embraced within the terms of the 5th Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for public use without just compensation establishes a standard for our government which the Constitution does not make dependent upon the standards of other governments."

These considerations demonstrate conclusively that the Revenue Act of 1924 cannot be construed as the petitioner would have it construed, without contravening the due process clause of the Fifth Amendment.

CONCLUSION.

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted,

GREENE & HURD,
FRANCIS B. HAMLIN,
Attorneys for Respondents,
52 Broadway,
New York City.

FRANCIS B. HAMLIN,
JAMES L. POHR,
of Counsel.